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No. 93-373

In the

Supreme Court of the United States

October Term, 1993

Board of Education of the Borough of Englewood Cliffs,
Petitioner,

v.

Board of Education of the City of Englewood and the
State Board of Education of the State of New Jersey,
Respondents.

On Petition For a Writ of Certiorari
to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

FRED DeVESA
Acting Attorney General of New Jersey
Attorney for Respondent,
State Board of Education
R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 984-9664

MARY CAROL JACOBSON
Assistant Attorney General
Counsel of Record and On the Brief

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QUESTIONS PRESENTED

1. Does the Englewood Cliffs Board of Education have standing to raise constitutional equal protection claims on behalf of Englewood Cliffs' students?

2. Is the determination of the New Jersey Supreme Court final for the purposes of review by this Court where a possible remedy to this litigation -- the regionalization of the Englewood Cliffs, Englewood, and Tenafly public school districts and perhaps others -- is currently being studied by the New Jersey Department of Education and could influence the outcome of this litigation?

3. Has Englewood Cliffs raised a colorable equal protection claim where the determinations of New Jersey's highest education officials 1) to deny severance of the "sending-receiving" relationship under which Englewood Cliffs sends its high school students to Englewood's Dwight Morrow High School, and 2) to prevent other New Jersey public schools from accepting Englewood Cliffs or Englewood students on a tuition basis, created neither a racial quota nor a strictly race-based classification because they affected all students in both districts regardless of race and were designed to further the legitimate and compelling state interest of promoting racial balance in the public schools?

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BRIEF IN OPPOSITION

COUNTERSTATEMENT OF JURISDICTION

Federal standing requirements preclude the Englewood Cliffs School Board from raising the constitutional rights of its students because neither the Cliffs board nor its members has suffered a direct constitutional injury from the decisions of State education officials which mandate the public high school to be attended by Englewood Cliffs and Englewood students who choose to attend public school. See Valley Forge Christian College v. Americans United, Etc., 454 U.S. 464 (1982). Moreover, since the New Jersey courts affirmed the State's right to proceed with a study analyzing the possible regionalization of the Englewood, Englewood Cliffs, and Tenafly districts, as well as others, that study is ongoing at the present time, and more state judicial

proceedings are likely, the judgment below is not final for the purposes of review by this Court under 28 U.S.C. §1257. See North Dakota Pharmacy Bd. v. Snyder's Stores, 414 U.S. 156 (1973); Republic National Gas Co. v. Oklahoma, 334 U.S. 62 (1948).

COUNTERSTATEMENT OF THE CASE

The Board of Education of Englewood Cliffs ("Cliffs") seeks certiorari to overturn the decisions of New Jersey's highest education officials -- the Commissioner of the Department of Education and the State Board of Education -- that high school students from Cliffs, which does not have its own high school, must attend public school at Dwight Morrow High School in Englewood if they choose to attend public school, in keeping with the longstanding, voluntary, "sending-receiving" agreement between the districts. These decisions, reached after 99 days of administrative hearings and painstaking review of the facts and legal arguments raised by the parties, were based on the state officials' application of N.J.S.A. 18A:38-13 to the circumstances of this case. That statute prevents a district from withdrawing from a sending-receiving relationship if termination of the agreement will have a "substantial negative impact" on the educational quality, racial composition or financial health of either district. Both the Commissioner and the State Board concluded unequivocally that severance must be denied here because it would have a substantial negative impact on the educational quality and racial balance at Dwight Morrow. The New Jersey courts agreed, calling that conclusion "unassailable." (App. B at 66a). Furthermore, the state officials and state courts concluded that the relationship between the districts had been undermined by the private tuition policy of another district, Tenafly, and enjoined Tenafly and all other public school districts in New Jersey from accepting students from either Cliffs or Englewood.

The Cliffs Board seeks further review from this Court of these determinations, all well-grounded in New Jersey law, claiming that they violate the equal protection rights of Cliffs' students. These arguments were rejected resoundingly below (Apps. A and B), and are totally lacking merit. Certiorari should consequently be denied.

A. State Statutory Background

In New Jersey, school districts are typically organized at the municipal level, with the State having 593 school districts. Where a school district is too small to support its own high school, it must designate a high school outside of the district for the education of its high school students. N.J.Stat.Ann. 18A:38-11. This "sending-receiving relationship" is essentially a contract between the two districts whereby educational services are provided in exchange for a fixed tuition payment. N.J.Stat.Ann. 18A:38-8. To promote stability in the relationships and sound educational policy, however, neither district can withdraw from the relationship "except upon application made to and approved by the Commissioner [of the Department of Education]." N.J.Stat.Ann. 18A:38-13. New Jersey's courts have recognized the "expansive powers" of the Commissioner "over all sending-receiving relationships ... to provide stability...." Merchantville Bd. of Ed. v. Pennsauken Tp. Bd. of Ed., 204 N.J. Super. 508, 499 A.2d 523 (App. Div. 1985); see also Branchburg Tp. Bd. of Ed. v. Somerville Bd. of Ed., 173 N.J. Super. 268, 414 A.2d 259 (App. Div. 1980).

Termination of sending-receiving relationships is governed by N.J.Stat.Ann. 18A:38-13. Prior to submitting an application for severance, the district proposing termination must prepare a feasibility study addressing "the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by pupils in each of the districts, and the effect on

the racial composition of the pupil population of each of the districts." Ibid. After reviewing this study, the Commissioner "shall make equitable determinations based upon consideration of all the circumstances." Finally, the Commissioner "shall grant the requested change in designation or allocation if no substantial negative impact will result therefrom." Ibid. The Commissioner's determination in a sending-receiving case is subject to appeal to the New Jersey State Board of Education which "may in its discretion affirm, reverse, revise or modify" the Commissioner's decision. N.J.Stat.Ann. 18A:38-14.

B. The Administrative Decisions

Cliffs filed a petition with the New Jersey Commissioner of Education ("Commissioner") in December 1985 seeking to terminate its sending-receiving relationship with Englewood which had begun almost 20 years earlier. Under that agreement, Cliffs sent its high school students to Dwight Morrow High School, Englewood's only public high school. The Englewood Board opposed severance and filed a cross-petition against the Board of Education of the Borough of Tenafly ("Tenafly") because Tenafly had implemented a tuition program for non-resident high school students which had attracted significant numbers of Cliffs' pupils as well as some Englewood students. The Englewood Board also sought the creation of a regional school district at the high school level to be comprised of Englewood, Englewood Cliffs and Tenafly. The Commissioner transmitted the entire matter to the New Jersey Office of Administrative Law, where 99 days of evidentiary hearings were conducted from January 7, 1987 to October 6, 1987 before an Administrative Law Judge ("ALJ").

On April 18, 1988, the ALJ issued an initial decision recommending the denial of Cliffs' petition for severance because of the substantial negative impact that termination would have on the quality of education at Dwight Morrow

(App. E. at 244a). The ALJ concluded that this negative impact would be created by the loss of talented, college-bound Cliffs students, who were largely white and Asian, and a further erosion of the racial balance at Dwight Morrow, by then more than 85% black and Hispanic (App. E. at 205a), which had contributed to a "very enriching environment" at the school. (App. E at 264a).

The ALJ also recommended strongly that Tenafly be restrained from accepting any students from Cliffs or Englewood. He noted that Tenafly's private tuition policy was unusual, indeed aberrational when compared with other public schools in New Jersey which either have no tuition students or very few tuition students (App. E at 252a-253a).[1] After examining the policy, the ALJ concluded that it had many characteristics of private school placement, leading to a tendency to be racially selective because "whites and Asians, as a group, are better able to afford the entry fee." (App. E at 257a). Most significantly, the ALJ found that, "In practice, the policy has attracted a disproportionately high number of students residing in ... Cliffs and Englewood. Its practical effect is to drain upper income white and Asian college-bound students from DMHS, subverting that school's efforts to promote racial balance and luring many of its most academically talented students." (Ibid.; emphasis added). He then noted that while state education officials cannot prevent children from attending a nonpublic school, they do have "unchallenged constitutional and statutory responsibility for supervising the public education system." (App. E at 258a). He urged

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[1] Typically, public school districts in New Jersey have tuition policies designed to protect the continuity of education by accommodating students moving into or out of the district during the school year. Some districts extend attendance privileges to children of nonresident staff members without payment of tuition. Tenafly, however, implemented a selective admissions policy for non-resident, tuition-paying students in order to subsidize the operation of its high school during a period of declining enrollment. (App. E at 252a to 258a).

those officials to prevent Tenafly's policy from further undermining "the continuing ability of the Englewood district to provide equal educational opportunity as to all its students" by enjoining the policy as it applied to Cliffs and Englewood. (Ibid.)

The ALJ also denied Englewood's request to create a regional high school district combining Englewood, Cliffs and Tenafly. Under New Jersey administrative law, the ALJ's recommended decision was transmitted to the Commissioner for final action. N.J.Stat.Ann. 52:14B-10.

The Commissioner adopted the ALJ's key recommendations denying severance of the sending-receiving relationship and enjoining Tenafly's tuition policy for Englewood and Cliffs students (App. D at 148a to 187a). Notably, the Commissioner found that if he granted severance he "would place an imprimatur" on white flight from Dwight Morrow. (App. D at 165a). The Commissioner further found that the Tenafly tuition policy exacerbated racial imbalance at Dwight Morrow. (App. D at 183a). The Commissioner also observed that while N.J.Stat.Ann. 18A:38-3 permits local boards of education to enact tuition policies, when there is a conflict between that right and the "constitutionally and statutorily based policies of this state on racial integration, the Commissioner's obligation is to combat racial imbalance." (App. D at 187a). The Commissioner also agreed with the ALJ that regionalization of the three districts at the high school level was not appropriate.

These determinations were appealed to the State Board of Education. On April 5, 1990, the State Board affirmed the ruling of the ALJ and the Commissioner that termination of the sending-receiving relationship would have a substantial negative impact on Dwight Morrow. (App. C). Notably, the State Board examined the effect of termination not only at the time of the severance application, but also

several years earlier when the circumstances that precipitated the racial imbalance -- particularly Tenafly's tuition policy -- were adopted, and when termination would have decreased the white population at Dwight Morrow by approximately 6.5%. (App. C at 122a). Moreover, the State Board also agreed that Tenafly's tuition program had drained whites and Asians from Dwight Morrow and must be enjoined. (App. C at 129a).

The State Board held that while N.J.Stat.Ann. 18A:38-3 authorizes district boards to admit nonresident students with or without tuition, that statute -- enacted to ensure that the children of migrant workers and other children temporarily residing in New Jersey would be entitled to an education while in the state -- did not "create an absolute right for district boards to admit nonresident students on a tuition basis or otherwise." (App. C at 130a). The State Board then concluded that since N.J.Stat.Ann. 18A:38-3 involved the exercise of discretion by a district board, the Commissioner and the State Board both had the power and the responsibility to limit the exercise of that discretion where its exercise would thwart the State's overarching educational policy of encouraging racial balance and discouraging white flight. (Id. at 131a). The State Board not only enjoined Tenafly's tuition policy as to Englewood and Cliffs, but also directed the two districts to develop cooperatively a plan to encourage Cliffs students to attend Dwight Morrow. (App. Div. 134a). Moreover, the State Board expanded the injunction to prevent all public school districts in New Jersey from accepting Cliffs or Englewood students on a tuition basis to further assure that those public high school students would attend Dwight Morrow if they attend public school. (App. C at 133a).

Finally, the State Board refused to order regionalization as of the April 1990 date of its decision, but rather directed that the Commissioner monitor the progress of the districts and report back to the State Board annually for a period of

five years as to the implementation of the cooperative plan. When the Commissioner's first report revealed that the plan was not having the desired effect of reversing the trend of white migration from Dwight Morrow, the State Board directed that a regionalization study be conducted. Notably, the State Board's order directed the Commissioner to look at all potential configurations from kindergarten through high school and was not limited to the three districts involved in the litigation. (App. B at 51a to 52a). Cliffs then appealed to the New Jersey Superior Court, Appellate Division, from the State Board's orders 1) denying severance of the sending-receiving relationship, 2) enjoining all public schools from accepting tuition students from Cliffs, and 3) directing that a regionalization study be performed. Englewood cross-appealed from the Board's refusal to order regionalization based upon the existing administrative record. The Appellate Division stayed the regionalization study pending completion of its review of the case on the merits.

C. New Jersey State Court Decisions

On June 15, 1992, the Appellate Division affirmed the decisions of the State Board, noting that they were based upon sufficient credible evidence in the lengthy factual record (App. B). Indeed, the Appellate Division agreed that severance would have a substantial negative impact on Dwight Morrow, finding that conclusion "unassailable" (Id. at 66a). The Appellate Division also rejected Cliffs' contention that denying severance violated Cliffs' equal protection rights under the Fourteenth Amendment to the United States Constitution:

> What is at issue here is an administrative adjudication based upon legislatively intertwined concepts of the quality of education and the racial composition of the schools in question. Is it race

> conscious as Cliffs contends? The answer is yes. Is race consciousness prohibited? The answer is no. It is only the per se use of race as a determinant which creates a classification subject to strict scrutiny under the Fourteenth Amendment. [App. B at 71a].

The Appellate Division also rejected Cliffs' reliance on several decisions of this Court such as City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); and Regents of the University of California v. Bakke, 438 U.S. 265 (1978), which all involved invalidating absolute racial preferences in a zero-sum context (App. B at 69a). It not only saw no connection between the case before it and the cases cited by Cliffs, but characterized Cliffs' assertion that the "State Board attempted to reserve places for whites at DMHS in order to reduce minority representation" as a "distortion" of reality. (Id. at 72a).

The Appellate Division concluded, in fact, that the only possible classification which existed was geographical, not racial, especially since the injunction precluded other districts from accepting any Cliffs student, regardless of race (Id. at 73a). Accordingly, it concluded that the proper standard to be applied, and one which the State Board decision met, was the rational basis test which only required "some reasonable connection between a legitimate state interest and the action taken." (Ibid.) The court added, however, that even under heightened scrutiny the State Board's actions would still pass constitutional muster because they were amply supported by the compelling State interest in fostering diversity in the public schools and were properly and narrowly tailored to the circumstances presented. (Ibid.)

As to the State Board's injunction, the Appellate Division reaffirmed the breadth of the Commissioner and State Board's constitutional and legislative powers concerning public education, including their ability to order injunctive relief when necessary. (App. B at 77a to 79a). The court found that "Tenafly not only 'lured' and 'enticed' Cliffs' students by its 'beggar-thy-neighbor' policy, and in doing so siphoned off a disproportionate number of high achievers, but also attracted white and Asian Englewood students." (Ibid.) Given these facts, the court ruled that an injunction was not only authorized against Tenafly, but compelled. Moreover, as to the other school districts (none of which complained), the Appellate Division concluded that the injunction was a necessary adjunct to the restraints against Tenafly. Without the broader injunction, the court ruled, "the State Board could not ensure total compliance with the educational goals it sought to achieve. Most importantly, the injunction was a critical element of the State Board's attempt to remedy the problem at DMHS by using the least intrusive means." (Id. at 78a to 79a).

As to regionalization of the three districts, the Appellate Division upheld the State Board's authority to study the remedy and concluded that the necessity for further study was evident. The court then dissolved the stay of the study. Cliffs and Tenafly thereafter sought and were granted certification by the New Jersey Supreme Court to review the Appellate Division's decision. Englewood cross-petitioned from the court's determination not to order regionalization based on the existing record.

On June 9, 1993, the New Jersey Supreme Court affirmed the judgment of the Appellate Division, "substantially for the reasons set forth" in the lower court's 'comprehensive opinion.'" (App. A at 3a). The New Jersey Supreme Court specifically upheld the State Board's authority to conduct a regionalization study, although it found it unnecessary at this juncture to consider whether

regionalization was an appropriate administrative or judicial remedy in this case. (Ibid.) Based upon both New Jersey judicial decisions, the Commissioner has proceeded with the regionalization study, which remains ongoing at the present time.

D. This Petition

After the judgment of the New Jersey Supreme Court was issued, Cliffs filed a petition for certiorari with this Court, claiming that both the injunction and the denial of severance violated the equal protection clause and trying -- as it had tried unsuccessfully below -- to transform this state administrative matter into a reverse discrimination case or a federal desegregation matter. The circumstances here do not, however, fit within either of those "shoes". Lost amidst Cliffs' rhetoric alleging that the State Board decision treated Cliffs' students as "tools" to achieve more desirable racial balance at Dwight Morrow and Cliffs' protestations of innocence of discriminatory motives are several important facts. First, Cliffs initiated this litigation by seeking to sever long-term ties with Englewood. In response, the State Board applied State statutory standards and sound educational policy in denying severance. Moreover, this case is not an inter-district case despite Cliffs' claims to the contrary, because it involves districts that voluntarily used the same high school for more than twenty years and the State Board's efforts to reinforce that pre-existing agreement. Finally, this case is not a reverse discrimination case because a free public education is guaranteed to all students, the State Board orders applied to all high school students in Cliffs and Englewood regardless of race, and no quota of any sort was imposed. What this case does represent, however, is an effort by Cliffs to involve this Court in a state administrative decision based on sound educational policy and driven by concerns for educational quality and a desire not to condone white flight from one public school to another. Certiorari should thus be denied.

REASONS FOR DENYING THE PETITION

This litigation has already lasted for almost eight years and remains ongoing at the state administrative level where the New Jersey Department of Education is currently studying the advisability of directing the merger of the Englewood and Cliffs districts, and perhaps others, to address the racial balance and educational quality concerns that have arisen in this case. Certiorari should be denied, therefore, because this matter is not final within the meaning of 28 U.S.C. §1257, because the Cliffs Board lacks standing to raise the equal protection claims of its students, and because the sensitive educational issues at the heart of this case are best left to state education administrators to decide. That was the conclusion of the New Jersey courts, and should likewise be the conclusion of this Court because the only federal questions raised by Cliffs -- that the State Board orders violate the equal protection rights of Cliffs' students -- are totally lacking in foundation. Despite Cliffs' efforts to portray this case as a reverse discrimination matter, the Cliffs students -- the purported classification -- are not exclusively white and have suffered no harm other than their assignment to Dwight Morrow, a fully accredited high school, in keeping with the longstanding sending-receiving relationship between Cliffs and Englewood. As to Cliffs' claim that this Court's desegregation precedents apply, that argument is likewise divorced from the reality of this case which was initiated by Cliffs itself and which involves the efforts by New Jersey education administrators to apply state statutory standards governing sending-receiving relationships to the circumstances of this case.

1. Since the Judgment of the Supreme Court of New Jersey Is Not Final Under 28 U.S.C. §1257, This Court Should Deny Certiorari For Lack of Jurisdiction.

The jurisdiction of the Supreme Court to review a state court decision is generally limited to "[f]inal judgments or decrees rendered by the highest court of the State in which decision could be had ...." 28 U.S.C. §1257. The judgment of the New Jersey Supreme Court below in part upheld the right of the State Board to order the Commissioner to conduct a regionalization study examining the feasibility and advisability of merging the Cliffs and Englewood districts, and perhaps others, in an effort to resolve the racial balance and educational quality issues posed by this case. The study was the State Board's response to Englewood's cross-petition seeking regionalization of the districts and to the Commissioner's first annual report of the lesser remedies originally ordered by the State Board (i.e. the cooperative planning effort and the injunction) which had not had any discernible remedial effect. The study remains ongoing and will likely result in further administrative and judicial proceedings. The judgment which is the subject of this petition is consequently not final under 28 U.S.C. §1257.

The finality requirement serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Article III; and (3) it limits federal review of state court determinations of federal constitutional issues to minimize federal intrusion in state affairs. North Dakota Pharmacy Bd. v. Snyder's Stores, 414 U.S. 156, 159 (1973). See also Flynt v. Ohio, 451 U.S. 619, 621 (1981) (dismissing writ of certiorari because it appeared that in addition to federal issues raised in petition, other federal issues would be involved in trial court proceeding, thus

there was probability of piecemeal review); Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 70-71 (1948) (dismissing appeal because the "fate of the whole litigation may well be affected by the fate of the unresolved contingencies of the litigation."); Minnick v. California Dep't of Corrections, 452 U.S. 105, 120 (1982) (dismissing writ of certiorari because Court was "not persuaded that the outcome of further proceedings in the trial court ... will not have a significant effect on the federal constitutional issues presented by the certiorari petition.").

Englewood's cross-petition for regionalization has always been a key feature of this litigation; indeed, it is being examined as the possible ultimate remedy to the entire case. Cliffs and Tenafly opposed regionalization vehemently below and undoubtedly would continue that fight while Englewood has been similarly adamant in seeking this remedy. Review of this case at this time would thus clearly invite piecemeal adjudication. Moreover, should regionalization be ordered, Cliffs may raise state and federal constitutional objections similar to the issues raised in this petition. In fact, merger of the districts would likely prompt Cliffs to raise yet again its inter-district remedy arguments under the Fourteenth Amendment, albeit in the guise of challenging the merged districts.

In addition, New Jersey's education officials have not had their final say about the future configuration of the districts now before this Court. Refusing review here would thus minimize federal intrusion in state affairs -- one goal of the finality doctrine noted in North Dakota Pharmacy Bd. v. Snyder's Stores, supra, 414 U.S. at 159. Given these circumstances, the exceptions to the finality doctrine set forth in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477 (1975), simply do not apply. Certiorari should thus be denied.

2. The Board of Education of Englewood Cliffs Lacks Standing To Raise Equal Protection Claims on Behalf of Students In Its District.

A careful review of Cliffs' petition reveals that it is trying to vindicate the constitutional rights of its students rather than redress any injury to the board of education itself. Cliffs thus lacks standing to raise equal protection claims in this Court.

First, as a general rule a political subdivision of a state cannot invoke the protection of the Fourteenth Amendment against its creator, the state. See, e.g., Williams v. Mayor & City Council of Baltimore, 289 U.S. 36 (1933); City of Newark v. New Jersey, 262 U.S. 192 (1923); City of Trenton v. New Jersey, 262 U.S. 182 (1923). These precedents have been applied in lower federal courts to prevent school districts from asserting equal protection rights against the states that created them. Delta Special School District v. State Board of Education, 745 F.2d 532, 533 (8th Cir. 1984) (school district denied standing to sue State Board of Education under the Fourteenth Amendment concerning state statute which denied the district the right to appeal State Board decisions on transfer requests by students); Triplett v. Tiemann, 302 F. Supp. 1239, 1242 (D. Neb 1969) (equal protection clause held to have no application to acts of a State Board of Education against its own political subdivision).

Moreover, in order to invoke this Court's jurisdiction a party must meet the case or controversy requirement of Article III, which requires that the party show 1) that he or she personally has suffered some actual or threatened injury from the allegedly illegal conduct of the other party; 2) that the injury fairly can be traced to the challenged action; and 3) that the injury is likely to be

redressed by a favorable decision. Valley Forge Christian College v. Americans United, Etc., 454 U.S. 464, 471-472 (1982). The injury alleged must be "real and immediate," not conjectural or hypothetical. O'Shea v. Littleton, 414 U.S. 488, 494 (1974), quoting Golden v. Zwickler, 394 U.S. 103, 109-110 (1969).

Cliffs lacks standing here, therefore, because -- as a local board of education -- it cannot sustain injury from the State Board of Education under the equal protection clause. As a local political subdivision, it should not be permitted to sue the state which created it in federal court.[2] In addition, the Cliffs Board has not alleged any direct harm to itself from the State Board's actions, but rather has claimed only that the State Board's decisions violated the equal protection rights of Cliffs students. Where the local board itself suffers no injury, standing is lacking. Compare Board of Education v. Allen, 392 U.S. 236, 241 n.5 (1968) (standing permitted to allow local school board to challenge state statute that required public schools to lend textbooks to other schools, including parochial schools, where compliance would force board members to take allegedly unconstitutional action under the First Amendment; direct injury to board members found).

The State Board's decisions in this case represent a reaffirmation of the contractual agreement the parties voluntarily entered over twenty-five years ago. Surely they did not cause any direct injury to the Cliffs board that can be redressed under the equal protection clause. Certiorari

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[2] The fact that this case was heard by the New Jersey Supreme Court, and that the State Board conceded Cliffs' standing as a matter of State law, does not necessarily grant Cliffs standing for its claims in this Court. Indeed, the Supreme Court has recognized that the constraints of Article III do not apply to state courts, so that state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability, even when state courts address issues of federal law. Asarco v. Kadish, 490 U.S. 605, 617 (1989).

should be denied, therefore, because Cliffs lacks standing to raise the federal claims it has attempted to put before this Court.

3. The New Jersey Courts Properly Concluded That No Equal Protection Violation Occurred Here.

The New Jersey Legislature authorized the New Jersey Commissioner of Education to oversee sending-receiving relationships between districts, and directed the Commissioner to take into account, among other factors, the impact of severance on the racial composition of the districts. The Commissioner, the State Board, and the state courts thus properly considered racial balance as a factor in deciding that severance of the relationship between Cliffs and Englewood was not warranted. Notably, neither in this petition nor in the proceedings below did Cliffs question the Legislature's right to use the racial composition of affected schools as a legitimate factor in analyzing sending-receiving relationships. That omission is telling, because this Court has long recognized that in our imperfect society states may -- and sometimes must -- take race into account in decision-making. See, e.g., Shaw v. Reno, 113 S.Ct. 2816, 2824 (1993).

In fact, several justices of this Court have recognized the "unquestioned legitimacy" of certain race-conscious public policy goals analogous to the goal of improving racial balance at Dwight Morrow. In Regents of the University of California v. Bakke, 438 U.S. 265, 311-313 (1978), Justice Powell noted that a racially diverse student body "clearly is a constitutionally permissible goal for an institution of higher education." See also Id. at fn. 48, quoting former President William Bowen of Princeton University who praised the informal learning that occurred among students that were part of a diverse student body. To similar effect are Justice Stevens' observations in City of

Richmond v. J.A. Croson Co., 488 U.S. 469, 511-513 (1989), that race-based decisions such as those fostering an integrated police force or an integrated faculty may produce tangible and fully justified future benefits to integrated communities and integrated student bodies. Accord, Metro Broadcasting, Inc. v. F.C.C., 110 S.Ct. 2997, 3028 (1990) (Stevens, concurring). The majority opinion in Metro Broadcasting struck a similar theme when it noted that, "Just as a 'diverse student body' contributing to a 'robust exchange of ideas' is a constitutionally permissible goal on which a race-conscious university admissions program may be predicated ... [citing Bakke] ... the diversity of views and information on the airwaves serves important First Amendment values." 110 S.Ct. at 3010 Notably, the Court also found that the benefits of such diversity were not limited to minority groups who purchase stations under the F.C.C. minority ownership program, but extend to all members of the viewing and listening audience. Id. at 3011. And, even earlier, in Swann v. Charlotte-Mecklenberg Bd. of Ed., 402 U.S. 1, 16 (1971), former Chief Justice Warren Burger noted for the majority that school authorities might properly conclude that a racially balanced student body would help "prepare students to live in a pluralistic society," and "[t]o do this as an educational policy is within the broad discretionary powers of school authorities..."

Cliffs has not articulated why the State Board's application of the sending-receiving statute violates equal protection principles when the statute on its face does not. Indeed, a review of the record demonstrates that the school authorities applied the law just as it was written to prevent exacerbating racial imbalance in the student population at Dwight Morrow by reaffirming the existing agreement -- the status quo -- between Cliffs and Englewood. That such action could violate the equal protection clause would turn the Fourteenth Amendment on its head, as the State courts found below.

New Jersey's school authorities applied sound educational policies based on State statutory law in preventing severance and enjoining other districts from interfering in the sending-receiving relationship between Cliffs and Englewood. The decisions of school officials affected all of the students in both districts, all of whom were guaranteed a free public education. While racial balance was one of the goals sought to be achieved, no quotas were imposed, nor were any strictly race-based classifications used to apportion benefits and burdens. Simply put, this case is not a reverse discrimination matter where white students are denied access to benefits by an unyielding racial quota.

Nor is it a federal desegregation matter where this Court has carefully limited the provision of inter-district relief by federal courts to inter-district intentional, de jure discrimination. See, e.g. Milliken v. Bradley, 418 U.S. 717 (1974); Freeman v. Pitts, 112 S.Ct. 1430 (1992). Here the state courts affirmed the decisions of state educational authorities as to which public high school students in Cliffs should attend as a result of litigation initiated by Cliffs. Nothing in Milliken or Freeman requires a result different from the one ordered below. Certiorari is consequently unwarranted and should be denied.

CONCLUSION

For all of the foregoing reasons, the State Board of Education of the State of New Jersey requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

FRED DeVESA
Acting Attorney General of New Jersey
Attorney for State Respondent

MARY CAROL JACOBSON
Assistant Attorney General
Counsel of Record and On the Brief

R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 984-9664

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